SUPREME COURT OF THE STATE OF WISCONSIN
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H. McKENNEY, Clerk.

# SUPREME COURT

—OF—

# The United States.

**No. 153,**

**OCTOBER TERM.**

**1880.**

WILLIAM B. WADSWORTH, APPELLANT,

VS.

THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

BRIEF OF BARTLETT & HAYDEN,
DEFENDANT'S ATTORNEYS.

EAU CLAIRE, WIS.:
C. B. WALWORTH, BOOK AND JOB PRINTER.
—1880.—

# SUPREME COURT of the United States.

WILLIAM B. WADSWORTH, APPELLANT.

*Against*

THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

No. 153,—OCTOBER TERM, 1880.

## BRIEF OF BARTLETT & HAYDEN, DEFENDANT'S COUNSEL, EAU CLAIRE, WISCONSIN.

In 1864, an act was passed by the Legislature of the State of Wisconsin, authorizing the question of Railroad Aid to be submitted to the voters of Eau Claire, and other counties; and further provided that if submitted to the voters, and a majority of the ballots cast should be "for Railroad Aid," the County Board of Supervisors of such County should have power to cause to be issued, Bonds of said county, not to exceed fifty thousand dollars.

*Chapter 307, Laws of Wisconsin, 1864.*

The act further provided, that if the question of "Railroad Aid" was not submitted at the annual Town meeting for the year 1864, it could be submitted at any Election or Town Meeting thereafter, when any ten electors of the county should petition therefor, but in that case the notice of such proposed

submission to the voters of the county MUST BE GIVEN IN THE SAME MANNER AS NOTICES OF GENERAL ELECTIONS ARE REQUIRED TO BE GIVEN BY THE SHERIFF.

There was no election upon this question of "Railroad
2 Aid," at the annual Town Meeting, in 1864.

On the 24th day of October, 1867, a petition was presented to the County Clerk, asking that this question of "Railroad Aid be submitted to the electors of said county at the Annual Election, November 5th, 1867. What notice the Clerk gave does not appear, but from date of petition to date of election, October 24th, to November 5th, is only eleven days. The complaint alleges that a vote was had Nov. 5th, 1867, and was in favor of Railroad Aid.

That on the 15th day of March, 1870, the Railroad Com-
3 pany made a demand on the Board of Supervisors for the Bonds of the County, which was refused. No Bonds of the county have ever been issued, and no authority to issue said Bonds has ever been given by the Board of Supervisors, but on the contrary, the Board has refused to issue the same.

In 1872, said Chapter 307, of the Laws of 1864, was repealed.

*Chapter 116, Private and Local Laws, 1872.*

In November, 1876, this action was commenced by the plaintiff, (who claims, as assignee of the West Wisconsin Railway Company,) to compel the defendant to issue its Bonds to
4 the amount of Fifty Thousand Dollars.

*See Complaint, Record, page 2 to 6.*

The defendant demurred to plaintiff.

*Complaint, Record, page 6.*

The United States Circuit Court, (Judge Drummond, presiding,) sustained defendant's demurrer, and the plaintiff appealed to this Court.

We give herewith, in full, copies of the Complaint and Demurrer, also Chapter 307, Laws of Wisconsin, 1864; Chapter 116, for 1872, and several sections of the Revised Statutes of Wisconsin, relating to the notice required to be given by the Sheriff no General Elections.

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## ——COMPLAINT.——

**STATE OF WISCONSIN---Circuit Court---Eau Claire County.**

WILLIAM B. WADSWORTH, PLAINTIFF,

VS.,

THE BOARD OF SUPERVISORS OF THE COUNTY OF EAU CLAIRE.

DEFENDANT.

### COMPLAINT.

The above named plaintiff respectfully shows to the Court and alleges:

That, from prior to the year 1864 until the 4th day of June, 1867, the Tomah & Lake St. Croix Railroad Company was a corporation duly created, organized and existing under and by virtue of the laws of the State of Wisconsin, and, as such corporation, had the right, authority, and power to survey, locate and construct, and to maintain and operate a railroad, with one or more tracks or lines, from a point in the town of Tomah, by way of Black River Falls, on the most feasi- route to a point on Lake St. Croix, between townships 25 and 31. That on said last mentioned day the Board of Directors of said corporation, under and by virtue of the provisions of

Chapter 285, of the Private and Local Laws of 1866, entitled: "An act to legalize the organization of the Tomah & Lake St. Croix Railroad Company, with leave granted to change
7 the name of said company," by resolution changed the name of said Company to the "West Wisconsin Railway Company," ever since which time the latter company has been and now is a corporation vested with all the grants, rights, privileges and immunities of every name and nature theretofore bestowed upon the said Tomah & Lake St. Croix Railroad Company.

That the said county of Eau Claire, since prior to 1864, has been and now is a municipal corporation, organized and existing under and by virtue of the laws of said state. That said county by the provisions of Chapter 307, of the Laws of
8 1864, had conferred upon it the right, power and authority, in the manner therein specified, by vote, to agree to aid said company, in an amount not exceeding the sum of Fifty Thousand Dollars, in the construction of its said line of road, and to issue its bonds to pay therefor, and to make said contract upon the consideration that said company should locate, *construct* and operate said line of road through said county, and expend the money so granted in the construction of said road through said county.

That no election was held in said county on the subject of such aid, in the year 1864, as authorized by said chapter 307.

That in the month of October, 1867, the petition required
9 by Section 8, of said Chapter 307, signed by 22 of the qualified electors of said county, was presented to and filed with the Clerk of the Board of Supervisors of said county; which petition requested that a proposition to aid the said company, in the sum of Fifty Thousand Dollars, be submitted to the qualified electors of said county, at the general election, to be held therein on the 5th day of November, 1867, as will more ful-

ly appear from said petition, which is made part hereof, and of which the following is a full and correct copy:

**To the Clerk of the Board of Supervisors of Eau Claire County, Wis.:**

The undersigned electors of the county of Eau Claire and State of Wisconsin, do hereby petition you to give notice that the following question will be submitted to the electors of said county at the annual general election, to be held on the 5th day of November, 1867, for railroad aid to the Tomah & Lake St. Croix Railroad Company to the amount of fifty thousand dollars.

EAU CLAIRE, WIS., Oct. 24, 1867.

(Signed.)

| | |
|---|---|
| J. A. Gray. | L. Slingluff. |
| E. R. Foster. | C. R. Gleason. |
| J. L. Gilman. | G. W. Williams. |
| C. N. Palmer. | Joseph G. Thorp. |
| L. D. Burgar. | J. G. Calahan. |
| Geo. C. Teall. | E. Robert Hantzche. |
| J. B. Stocking. | C. E. Chandler. |
| H. M. Stocking. | Peter Truax. |
| E. M. Bartlett. | DeWitt C. Clark. |
| G. E. Porter. | D. H. Ketchum. |
| Sheriff Hatheway. | T. F. Kenyon. |

That immediately upon the filing of such petition, the said clerk did, in a due and proper manner, and in all respects as required by Law, give public notice of the proposed submission of the said question of municipal aid to the electors of the said county at the general election to be held therein in said year.

That the aforesaid question of municipal aid to said company was submitted to the electors of said county at the said general election held on Tuesday, the 5th day of November, 1867. That said election was held and conducted in

the same manner that other general elections are required by law to be conducted, and in the manner prescribed by said chapter 307, and the votes cast at such election "for Railroad aid" and "against Railroad aid" were counted, canvassed and returned in the same manner as the votes at any general election in said county, and the canvassers made, certified, signed and deposited with the said clerk a statement of the whole number of votes cast upon said question of railroad aid as well as a statement of the number "for railroad aid" and the number " against railroad aid,"

and at said election a matority of the votes was cast in favor
13 of such aid, as will more fully appear by inspection of such statement, which is made a part hereof, and of which the following is a copy.

TABULAR STATEMENT OF VOTES POLLED FOR COUNTY OFFICERS.

| | Co. Sup't of Schools. | | | District Att'y. | | County Supervisor Dist. No. 2. | | | | For Railroad Aid. | Against R. R. Aid. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | A. Kidder. | W. H. Lockwood | L. E. Latimer. | H. Cousins. | W. Woodworth | W. H. Bailey. | H. P. Graham. | Randall. | C. Bailey. | | |
| Bridge Creek, | .... | 81 | 13 | 70 | 23 | .... | .... | .... | .... | 79 | 2 |
| 14 Otter Creek, | 1 | 60 | 27 | 59 | 28 | .... | .... | .... | .... | 2 | 79 |
| Eau Claire, | 1 | 200 | 155 | 192 | 143 | 183 | 137 | 1 | 1 | 261 | 1 |
| Pleasant Valley, | .... | 18 | 8 | 10 | 16 | 4 | 21 | | .... | 9 | 7 |
| Brunswick | 1 | 32 | 24 | .... | .... | 29 | 24 | .... | .... | 12 | 26 |
| West Eau Claire, | .... | 102 | 190 | 164 | 126 | .... | .... | .... | .... | 115 | 106 |
| Oak Grove | .. . | 27 | 38 | 31 | 34 | .... | .... | .... | .... | 52 | .. . |
| North Eau Claire | .... | 33 | 72 | 32 | 76 | .... | .... | .... | .... | 108 | .... |
| Lincoln, | .... | 21 | 46 | 19 | 46 | .... | .... | .... | .... | 50 | .... |
| Total | 3 | 574 | 553 | 557 | 492 | 216 | 182 | 1 | 1 | 688 | 221 |

STATEMENT OF COUNTY BOARD OF CANVASSERS.

STATE OF WISCONSIN, } ss.
EAU CLAIRE COUNTY. }

We, Martin Daniels, Clerk of the County Board of Supervisors, and B. C. Dunn, Justice of the Peace, and H. W. Barnes, County Judge of Eau Claire
15 County aforesaid, constituting a County Board of Canvassers therefor, do hereby certify that the foregoing statement is correct and true, as certified from the original re-

turns made to the Clerk of the County Board of Supervisors of said county, and as compared therewith by us, and that from said returns it appears that at the annual election held in the several towns in said county, on Tuesday, the 5th day of Nov., 1867,

* * * * * * * * * * *

The whole number of votes given on the question of Railroad Aid, was nine hundred and nine, of which number six
16 hundred and eighty-eight were for Railroad Aid, and two hundred and twenty-one were for Railroad Aid "No."

Given under our hands at the office of the Clerk of the County Board in Eau Claire County aforesaid, this 12th day of November, 1867,; and we certify that two erasures and corrections were made in the vote on Railroad Aid before signed.

MARTIN DANIELS,
Clerk County Board.
BENJ. C. DUNN,
Justice of the Peace.
H. W. BARNES,
County Judge.
} County Board of Canvassers.

That said Company, under the direction of competent engineers, surveyed a line of railroad upon the aforesaid route, and located its line of road according to such survey. Said
17 road was fully constructed on or about the first day of December, 1871, ever since which time it has been, and now is, run and operated as a railway by said company, and such line of road as surveyed, located and constructed, and operated, runs through the said county of Eau Claire, and was constructed through said county prior to March 10th, 1870.

That said company constructed its said line of railway through said county at a cost, in the grading thereof, and in the purchase of ties therefor, greatly in excess of Fifty Thousand Dollars, as the said Board of Supervisors well knew, and
18 such work was done, and money expended by the said company upon the faith and credit of such aid granted by said county, and with the full understanding and belief that said bonds would be issued and delivered to said company as the said county had promised and agreed, and said company built said roadthrough said county and expended the money therefor as

aforesaid, solely and wholly upon the understanding and belief that the said contract of said county would be performed upon its part, and the said bonds issued and delivered to said company in accordance with the terms thereof, and the said company
19 would not have built said road and expended said money except upon the faith and credit of, and reliance upon, said contract made with said county, as the said county well knew.

That the said company, prior to the demand hereinafter mentioned, fulfilled all the conditions, and performed all the acts upon its part to be kept and performed, which are in any manner precedent to the issuing and delivering of the said bonds as aforesaid, and of which the said Board of Supervisors had notice, and it thereupon became, and was the duty of said
20 Board of Supervisors to cause to be issued the bonds of said county, of a denomination of not less than one hundred dollars nor more that one thousand dollars each, amounting in the aggregate to the sum of Fifty Thousand Dollars, and deliver the same to said company.

That on and prior to the 15th day of March, 1870, said company duly demanded said bonds from the Board of Supervisors of said county, which demand was then and there refused, whereupon the said Board of Supervisors formally made and recorded their refusal in the minutes of their proceeding in the
21 words and figures following, viz:

"The County Board of Supervisors of Eau Claire county, met at the office of the Clerk, all members present; the Board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Company, as voted in 1867, and expressed themselves as willing to issue the bonds of the county, if they could be paid by a tax, as understood at the time the vote was taken, but as our highest courts have decided that it is illegal to levy and collect a tax to pay such bonds, they refuse to issue

them. They are unwilling to issue the bonds of the county which cannot be paid, but must be repudiated in the end,
22 for the reason that it would be unjust to the bondholder, and a disgrace to the county."

And requested the County Board of Supervisors of said county to cause said bonds to be issued and delivered to said company, as required by law, and the aforesaid vote of the electors ot said county.

That said Board of Supervisors refused to comply with such demand, and has ever since, and does now neglect and refuse to take any steps whatever to comply with such demand, and to cause said bonds to be issued and delivered as aforesaid.

That on or about the 1st day of September, 1875, and prior to the commencement of this action, the said company, for a valuable consideration, by an instrument in writing duly and
23 properly assigned, transferred, and set over to the plaintiff all and every cause or causes of action in law and equity which it then had, or was entitled to, against the defendant herein, for failure to issue and deliver the said bonds as aforesaid,

Wherefore the plaintiff prays that the defendant may be decreed specifically to perform the said contract entered into as aforesaid, and to execute and deliver the said bonds to the plaintiff in accordance with the terms of said contract, and to pay the costs herein; and, that the plaintiff my have such further and other relief as to the Court may seem meet, and the nature
24 of the case require.

DIXON, HOOKER, WEGG & NOYES,
Plaintiff's Attorneys,
Milwaukee, Wisconsin.

## DEMURRER.

(Title of Cause.)

And now comes the defendant in the above entitled action, by Loren Edwards, District Attorney of Eau Claire County, and Bartlett & Hayden, defendant's Attorneys, and demurs to plaintiffs complaint heaein, and alleges as grounds of said demurrer:

FIRST,—That said complaint in this action does not state facts sufficient to constitute a cause of action.

SECOND,—That the said action having been commenced on the 9th day of November, 1876, by service of the summons and complaint on that day, and the plaintiff having alleged his cause of action in said complaint as of March 15th, 1870, and more than six years prior to the commencement of said action it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the statute of limitation.

LOREN EDWARDS,
District Attorney.
and BARTLETT & HAYDEN,
Defendant's Attorneys.

*Chapter 307, General Laws of Wisconsin, 1864.*

[Published April 20, 1864.]

AN ACT to authorize certain counties, therein named, to aid in the construction of a railroad from Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company.

*The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:*

SECTION 1. At the annual town meeting for the election of town officers, to be held in and for the different towns comprising the counties of St. Croix, Dunn, Chippewa, Pierce,
26 Eau Claire, Buffalo, Clark, Trempealeau, Jackson, Pepin, and Monroe, in the year one thousand eight hundred and sixty-four, or at any subsequent annual town meeeting or general election held in each and any of said towns comprised in any one of said counties, the legal voters of said counties, or either of them, may deposit ballots, written or printed, in words as follows, to-wit: "for railroad aid," or "against railroad aid." Such ballots shall be deposited in a separate box provided for that purpose by the inspectors of election, and such ballots shall be considered as the votes of the legal voters upon such question, and shall be counted, canvassed and returned to the
27 proper officers as in other elections, and as provided under the election laws of the state, applicable thereto; *provided*, ten days' notice of such submission shall be given by the sheriff of the said counties, respectively, by posting in each town in the county, in four public places, a written or printed notice stating that a submission of the question of railroad aid will be had.

SECTION 2. If a majority of the ballots cast in any of said counties be "for railroad aid," the county board of supervisors of said counties shall have power, by resolution, to cause to be

issued bonds of a denomination of one hundred dollars to one thousand dollars each, to an amount not exceeding fifty
28 thousand dollars for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per centum, payable semi-annually in the city of New York, at such place as the treasurer of the state shall designate.

SECTION 3. The county board of supervisors of each of said counties shall annually cause to be levied and collected, as other state and county taxes are collected, a sum of money sufficient to pay the interest accruing and existing by reason of the bonds which either of said counties may issue, at the rate aforesaid and such further amount to defray any expense attending the payment of such interest. The county treasurer of
29 each of said counties shall pay over the same to the state treasurer, who shall receive and apply the same to the payment of such accruing interest at the time or times, place or places, when and where the same shall become due.

SECTION 4. From and after the fifteenth year after the issue of bonds by any of said counties, the board of supervisors of each of said counties, respectively, shall annually cause to be levied and collected, as a special tax for that purpose, in the manner state taxes are collected, a sum not exceeding five per cent. of the amount of bonds which may have been issued or which may remain outstanding at such time; the amount so annually collected in said counties as aforesaid,
30 to be paid over by the county treasurer of each thereof, to the state treasurer. The state treasurer, with the proceeds, shall annually apply the same to the payment of the bonds so outstanding against each of said counties; and in the event of not being able to find parties who may hold the same willing to receive payment thereon, in that event the state treasurer shall invest such amounts so received in state or United States stocks, and shall receive thereon the amount of interest

arising therefrom, and shall reinvest such interest in such stocks, and shall annually report to the county boards of each of said counties, the manner in which he has invested such
31 amounts so paid to him as aforesaid, and the condition of the fund so annually to be raised for the period aforesaid as a sinking fund. The state treasurer shall, during the year previously to the time any of the bonds issued by any of said counties shall become due, realize upon the investments made by him for the purpose of paying and redeeming said bonds, and notify the board of supervisors of each county at least one year before such bonds become due, of the probable amount which he has or will realize from such securities, and the amount of bonds outstanding against each of said counties, and the probable deficiency which will remain after applying such amount so realized in payment of said bonds, together with all
32 proper costs and charges. That it shall be the duty of each of the boards of supervisors of said counties to cause to be collected and paid over to the treasurer of the state, during the year previously to the maturity of any of said bonds, a sum sufficient to make up the same amount due, and that the same be paid over by the county treasurers of said counties to the state treasurer, who shall apply the same in the payment and cancellation of said bonds when they become due.

SECTION 5. For the purpose of promptly meeting the first installment of interest, or any future deficiency before the taxes herein authorized to be collected for any bonds which any of said counties may issue, the board of supervisors of
33 each of said counties shall have power to make temporary loans for any term not exceeding six months, but such loan shall not exceed seventy-five per centum of tax levied and assessed for the purpose for which such loans may be made, and such temporary loans shall be paid by the treasurer of the state out of the tax when collected.

SECTION 6. Any future dismemberment of the present territory comprising any of the counties aforesaid, by the erection of a new county or otherwise, the portion detached shall continue to be taxed for the purposes herein and by this act provided, the same as if such detachment had not been made, and according to the value of the property therein.

SECTION 7. The said bonds, when authorized to be issued as aforesaid, shall be held by the county board of supervisors of each of said counties, and the same, or the avails thereof, shall be expended in the counties which issued the same, provided the railroad passes through the said county, in the grading of said railroad or in the purchase of ties therefor; and the said bonds shall be delivered to the said railroad company when the board of supervisors, of each of said counties are satisfied that the same will be applied for such purpose.

SECTION 8. If from any cause the said question is not submitted to the electors of either of said counties at the annual town meeting, on the first Tuesday of April, one thousand, eight hundred and sixty-four, it shall be submitted at any election or town meeting thereafter, when any ten electors of said county shall file with the clerk of the County Board of Supervisors a petition therefor; and when such petition is thus filed the said clerk shall give notice of the proposed submission of such question in the same manner as notices of general elections are now required by law to be given by the sheriff.

SECTION 9. This act shall take effect and be in force from and after its passage and publication.

Approved April 1, 1864.

*Chapter 116, Private and Local Laws, 1872.*

[Published April 5th, 1872.]

AN ACT to repeal a portion of Chapter 307, of the General Laws of 1864, entitled: "An Act to authorize certain counties therein named, to aid in the construction of a railroad from Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company."

*The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:*

SECTION 1. So much of Chapter 307, of the General Laws of 1864, entitled: "An Act to authorize certain counties therein named to aid in the construction of a railroad from
37 Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company," as authorizes the issue by the county of St. Croix and the county of Eau Claire, of any bonds in the aid of the construction of said railroad is hereby repealed.

SECTION 2. All acts, or parts of acts, conflicting with the provisions of this act, are hereby repealed.

SECTION 3. This act shall take effect and be in force from and after its passage.

Approved March 25, 1872,

## CHAPTER V.

### OF THE REVISED STATUTES OF WISCONSIN, OF ELECTORS AND GENERAL ELECTIONS.

* * * * * * * *

SECTION 14. The general election prescribed in the Constitution shall be held in the several towns, wards, villages and election districts, on Tuesday next succeeding the first
38 Monday in November in each year, at which time there shall be chosen such representatives in Congress, electors

of President and Vice President, state officers and county officers, as are by law to be elected in such year.

* * * * * * * *

SECTION 17. The Secretary of State between the first day of July and the first day of September in each year in which a Governor, Lieutenant-Governor, Secretary of State, Treasurer, Attorney-General, State Superintendent, representatives in Congress or state Senators are to be elected for a full term of office, or in which electors of President and Vice-President, are
39 to be elected, shall make out a notice in writing, stating that at the next general election the officers aforesaid, or so many of such officers as are then to be chosen, are to be elected, and specifying in the case of such Representatives and Senators, the respective districts in which they are to be elected, and shall publish a copy of such notice in a newspaper printed at the seat of government, once in each week from the date of such notice until the election to which it refers, and shall deliver a like notice to the sheriff of each county in which such election is to be held, specifying the said officers to be voted
40 for in such county, and in the case of a Senator. the number of the district.

SECTION 18. The Sheriff, thereupon shall forthwith cause a notice, containing the substance of the notice so received by him, to be delivered to each town clerk, and the clerk of each village in which by virtue of its acts of incorporation general elections are to be held, and to one of the inspectors of election in each ward in any city of his county, and shall also publish a copy thereof in a newspaper published in his county, if there be one, and if there be none, then in a newspaper published in an adjoining county, once in each week from the date of such
41 notice until the election to which it refers. Whenever the office of Sheriff shall be vacant, and there shall be no person authorized to perform his duties, the county clerk shall

receive, make out, deliver and publish such notices.

The defendant claims that the complaint does not state facts sufficient to constitute a cause of action, and that the order made by the Circuit Court, sustaining the demurrer, should be affirmed by this Court.

FIRST.

From the allegations of the complaint it appears that no legal election was held in said county upon this question of voting said Railroad Aid.

42 Section 8, of said Chapter 307, requires notice to be given in like manner as sheriff's are required to give notice of a general election.

On examination of Sections 14, 17 and 18, of Chapter 5, of the Revised Statutes of Wisconsin, we find that general elections are held on the Tuesday next succeeding the first Monday in November of each year. That the notices of such election must be made between the first day of July and the first day of September, of each year, and that the sheriff shall publish such notice once in each week, from the date of such notice, (to-wit: September 1st,) until the election to which it refers. The Sheriff shall also deliver a copy of such notice to each
43 Town Clerk in his county, the Clerk of each incorporated village, and to the inspectors of election of each ward in any city in his county.

The notice, therefore, of this election which is claimed to have been had November 5th, 1867, should have been given as early as September 1st, 1867, and published from that time until election, November 5th.

No such notice was given.

The petition, upon which the notice is based, is dated Oct.

24th, 1867, only *eleven* days before election. *When* that petition was filed with the Clerk, and notice issued, the complaint
44 fails to state, except that it was so filed and notice issued in the month of October, 1867.

The Board of Supervisors refused to issue any Bonds, and their refusal is *prima facia* evidence that no legal election was held.

*Veeder vs. Town of Lima, 19, Wis., 280.*

*Commissioners of Knox Co., Indiana vs, Aspinwall et al., 21 Howard, U. S., 539,—Opinion of Court on page 544.*

45 *Pendleton Co., vs. Amy, 13, Wallace 297.—Opinion of the Court on page 305.*

*Dillon on Corporation, Vol. 1, Section 108, and cases therein cited.*

SECOND.

The act of 1864 does not create any contract between the County and Railroad Company. The submission of the question of Railroad Aid to the voters of the county, even if it had been legally done,—and vote taken thereon,—did not impose any obligation upon the county. The vote does not make a contract.

The law of 1864 does NOT say that the Board of Supervisors SHALL ISSUE Bonds to the amount of fifty thousand dollars if the vote is in favor of Railroad Aid. Section 2, of said
46 Act, provides that: "If a majority of the ballots cast in
" any of said counties be "'For Railroad Aid,'" the County
" Board of Supervisors of said counties shall *have power*, by
" resolution, to cause to be issued bonds of a denomination of

" one hundred dollars to one thousand dollars each, to an " amount not exceeding fifty thousand dollars for each of said " counties."

The law is not mandatory ; it was merely enabling. When the question of Railroad Aid was legally submitted to the qualified electors of the county, and the vote resulted in favor of " Railroad Aid," then, and not till then, was the power delegated and given to the Supervisors to determine what amount,
47 if any, of Bonds should be issued and donated to the railroad. The Railroad Company was no party to this vote, and have no claim upon the Board of Supervisors. In the language of Justice Bradley, in case of County of Scotland vs. Thomas, 4th Otto, page 692 : " It was discretionary with them " whether to subscribe or not, and (within the limits imposed by " by the act,) how much they should subscribe."

This question is not a mooted one in any State in this Union. The Supreme Court of nearly every State, has decided that in a case like this, where the power is delegated to the Board, the vote does constitute a contract, and, until the Board of
48 Supervisors,—by resolution,—issue, or cause to be issued, the Bonds, or by some official act, as a Board, agree to donate a certain sum in Bonds,—NO CONTRACT EXISTS.

In the language of Justice Nelson, in case of Aspinwall, et al., vs. Commissioners of the County of Daviess, 22 Howard, U. S., page 379: "Until the subscription is made, the contract is " unexecuted and obligatory upon neither party."

This question is fully considered and authorities cited in

High's Extraordinary Legal Remedies, Sec. 390. In commenting upon cases like this, where the authority to donate
59 Bonds or subscribe stock is vested by the law, with the officers of the municipality, the author says: "Such a "vote, therefore, does not constitute sufficient foundation for a "mandamus to compel the county to issue its bonds or to levy "a tax in aid of the subscription. * * * In such "case, until a contract has been actually consummated between "the OFFICERS of the county and the railway, the acts of the "former, and of the voters of the county, are regarded, as be-"tween themselves, the one as principal and the other as agent. "No contract exists with the railway company, and until the "money is actually raised, or the stock taken, the princi-"60 pal and agent, that is, the people and their officers, alone "have control of the proceedings, and mandamus will "not lie."

We further cite the following cases, fully sustaining the position we take in this case:

*Union Pacific R. R. Co., vs. Commissioners of Davis Co., 6 Kansas, 256.*

*Commissioners of Crawford vs. Louisville, New Albany & St. Louis Air Line R. R. Co., 39 Indiana 192.*

*12 B. Monroe, 144.*

*The People vs. Tazwell Co.*

*22 Illinois, 147.*

*21 Wendall, 139.*

61 *39 Missouri, 485.*

*Bissell vs Kankakee, 64 Illinois,* 249.

*Ryan vs. Lynch, 68 Ill., 160.*

*Town of Queensbury vs. Culver, 19 Wallace,—Opinion of the Court, page 91.*

*McClure vs. Township of Oxford, 4 Otto, 429.*

*Township of East Oakland vs. Skinner, 4 Otto 255.*

*Marsh vs. Fulton County, 10 Wallace, 676.*

*County of Bates vs. Winters, 97, U. S. 83.*

*Dillon on Municipal Corporations, Sections 42, 108, Note 417, 418, 423, 426.*

It is evident from an examination of the act of 1864, and from the authorities herein cited, that the power to make a contract with the railroad was vested in the Board of Su-
62 pervisors, and only in such Board.

If the Board refused to issue the Bonds, or unless by resolution, in some manner, agreed so to do, then no contract was made.

That the Board refused to enter into any contract with the Railroad, and to issue any Bonds, is fully admitted in the Complaint.

*Record, page 5, folio 9.*

To make a valid contract, the minds of the two contracting parties must meet. This was not done. The Railroad asked the County to make it a donation of not to exceed fifty thousand dollars. The Board of Supervisors, the only per- [illegible] has been held.

High's Extraordinary Legal Remedies, Sec. 390. In commenting upon cases like this, where the authority to donate
59 Bonds or subscribe stock is vested by the law, with the officers of the municipality, the author says: "Such a "vote, therefore, does not constitute sufficient foundation for a "mandamus to compel the county to issue its bonds or to levy "a tax in aid of the subscription. * * * In such "case, until a contract has been actually consummated between "the OFFICERS of the county and the railway, the acts of the "former, and of the voters of the county, are regarded, as be- "tween themselves, the one as principal and the other as agent. "No contract exists with the railway company, and until the "money is actually raised, or the stock taken, the princi-
"60 pal and agent, that is, the people and their officers, alone "have control of the proceedings, and mandamus will "not lie."

We further cite the following cases, fully sustaining the position we take in this case:

*Union Pacific R. R. Co., vs. Commissioners of Davis Co., 6 Kansas, 256.*

*Commissioners of Crawford vs. Louisville, New Albany & St. Louis Air Line R. R. Co., 39 Indiana 192.*

*12 B. Monroe, 144.*

*The People vs. Tazwell Co.*

*22 Illinois, 147.*

*21 Wendall, 139.*

61 *39 Missouri, 485.*

*Bissell vs Kankakee, 64 Illinois,* 249.

*Ryan vs. Lynch, 68 Ill., 160.*

*Town of Queensbury vs. Culver, 19 Wallace,—Opinion of the Court, page 91.*

*McClure vs. Township of Oxford, 4 Otto, 429.*

*Township of East Oakland vs. Skinner, 4 Otto 255.*

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To make a valid contract, the minds of the two contracting parties must meet. This was not done. The Railroad asked the County to make it a donation of not to exceed fifty thousand dollars. The Board of Supervisors, the only persons who had the power to make this donation, refused
63 to do it.

The act of 1864 gave the power to the Board to make a donation, under certain conditions, to the railroad, but did not compel the Board to do it, and no mandamus will lie to compel the Board to act in a matter that it is not mandatory, but merely discretionary.

Having shown that no contract existed at the time of the commencement of this action, the power to issue any Bonds, if any ever existed, has been taken from the Board of Supervisors.

In 1872, the power granted to the Board to issue bonds was annuled by the repeal of Chapter 307, of the laws of 1864.

*Chapter 116, Private and Local Laws, 1872.*

That the Legislature had the right to repeal that law, and the effect of that repeal is clearly expressed in the following decisions:

64 *Dillon vs. Linder, 36 Wis. 344.*

"Whatever a Statute gives, which has not ripened into a "vested right, a repeal of the Statute may take away."

*Opinion of Chief Justice Ryan, 36 Wis. 349.*

*Harshman vs. Bates County, 92 U. S., 569.*

*Town of Concord vs. Savings Bank, 92 U. S., 625.*

*County of Moultrie vs. Savings Bonk, 92 U. S., 632.*

*Opinion of Justice Strong, page 633.*

*County of Bates vs, Winters, 97 U. S., 83.*

*Dillon on Corporations, 2d Ed., Vol, 1, Section* 42.

On Statutes of Limitations
Leyfons & Wis 1625

There has been quite a diversity of judicial opinions in the several States in reference to the power of municipal corporations to donate aid to Railroads. The Supreme Court
65 of Wisconsin and some other States, have decided that it cannot be done, even under the authority of the Legislature.

*Whiting vs. The Sheboygan & Fond du Lac Railroad Company* 25, *Wis.* 167.

45 " 543

That decision was rendered by the Supreme Court of Wisconsin, in January 1870, and just prior to the alleged refusal of the County Board to issue Bonds.

That point has been settled by the decisions of the Supreme Court of the United States. Where no Bonds have been issued, as in this case, courts have decided, and it has be-
66 come well settled:

FIRST,—

That without legislative authority municipal corporations cannot donate aid to a railroad.

SECOND,—

Where the rights to donate aid, or issue Bonds, is conditioned upon a vote of the people, that vote must be had, strictly according to the law, before any Bonds can be issued.

THIRD,—

That the Board upon whom is given the power to issue the
67 Bonds, are the judges as to whether a legal election has has been held.

FOURTH,—

That a mere vote does not constitute a contract.

FIFTH,—

That the authority granted to a county by the Legislature to donate aid or take stock in a Railroad, and issue its Bonds therefor, is not a contract, and may be repealed, at any time before the Bonds are issued or subscriptions made.

The authorities herein cited, we think, fully sustain these points.

In this case, there was no legal election; no Bonds were issued; no subscription of stock; no agreement of any kind to issue Bonds, and the law granting the authority was repealed before the commencement of this action.

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The Circuit Court sustained the defendant's demurrer and we think the order of the Court below should be affirmed by this Court.

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Attorneys for Defendant.